Supreme Court No. 84500-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID MOELLER,

Plaintiff/Respondent,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON and FARMERS INSURANCE EXCHANGE,

Defendants/Petitioners.

PETITIONERS' ANSWER TO AMICUS CURIAE MEMORANDUM OF NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITIONERS' SUPPLEMENTAL BRIEF

Jill D. Bowman, WSBA #11754
Stevan D. Phillips, WSBA #2257
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 624-0900

Attorneys for Petitioners Farmers Insurance Company of Washington and Farmers Insurance Exchange

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Petitioners Farmers Insurance Company of Washington ("FIC") and Farmers Insurance Exchange (collectively, "Farmers") respectfully submit the following answer to the brief of *amicus curiae* National Association of Mutual Insurance Companies ("NAMIC").

I. NAMIC CORRECTLY POINTS OUT THAT THE COURT OF APPEALS' DECISION RESTS ON THE UNPROVEN ASSUMPTION THAT MOELLER'S CAR AND THE CARS OF ALL MEMBERS OF THE CLASS HAVE NON-REPAIRABLE PHYSICAL DAMAGE ALTHOUGH PROPER REPAIRS WERE PERFORMED ON THE CARS.

After acknowledging that Moeller's collision damages have been repaired, the Court of Appeals stated, as if it were a proven fact, that "there remains damage that cannot be repaired, e.g., weakened metal." *Moeller v. Farmers Ins. Co. of Washington,* 155 Wn. App. 133, 143, 229 P.3d 857 (2010).[1] The Court of Appeals also assumed erroneously that any damage that cannot be repaired is "physical damage." *Id.* at 142.[2]

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[1] The trial court made no determination that Moeller's car actually had post-repair non-repairable damage. This is not surprising in light of expert evidence explaining that when damaged vehicles are properly repaired, they are returned to pre-accident safety, reliability and appearance, and no non-repairable physical damage remains. CP 835-45.

[2] Physical damage is damage having an objective existence such as unrepaired dents, bends or stress to the vehicle's structure, and damage to the function or appearance of the vehicle. It does not include metaphysical loss attributable to the fear that unproven damage remains following a repair of the vehicle. *Degenhart v. AIU Holdings, Inc.,* No. C10-5172RBL, 2010 U.S. Dist.

(continued . . .)

According to the Court of Appeals, this post-repair damage "that cannot be repaired ... results in diminished value." *Id.* at 142.

As NAMIC correctly points out, the Court of Appeals cited no case law and no collision industry data supporting the proposition that after a car is properly repaired, non-repairable physical damage always remains.[3] *See* NAMIC Brief ("Br.") at 5. The Court of Appeals' assumptions fail to take into account situations where there is not even any possibility of post-repair remaining physical damage. For example, it is standard industry practice for repair shops to replace rather than repair unibody structural components that are structurally compromised as the result of a collision. NAMIC Br. at 4-5. When a damaged part is completely replaced as part of the repair, no "weakened metal" or other physically damaged part remains because the damaged part has been entirely replaced with metal

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(. . . continued)
Lexis 125524 at *14 (W.D. Wash. Nov. 26, 2010). It is a matter that the Plaintiffs must demonstrate by proof at trial. *Id* at *15.

[3] *But see Mansker v. Farmers Ins. Co. of Washington,* No. C10-0511JLR, 2010 U.S. Dist. LEXIS 95690, at *15-17 (W.D. Wash. September 14, 2010) (citing Judge Robert Alsdorf's 2008 arbitration ruling in *Scammell v. Farmers Ins. Exch.,* No. 01-2-13321-2 (Wash. Super. Ct.), which rejected as unreliable an insured's evidence suggesting that every vehicle would sustain post-collision, post-repair diminished value of not less than 10 percent of the fair market value the vehicle would otherwise have had, and explained that the insured's argument "reinforces the conclusion that diminished value occurs separate and apart from actual and ongoing physical damage.").

that has not been in an accident and therefore is not "weakened." The Court of Appeals entirely failed to take such repairs into account or to acknowledge the difference between a repair of a damaged part and the replacement of that part. Furthermore, the Court of Appeals failed to offer a reason why cars with weakened metal will always suffer diminished value damages.[4] In any event, Moeller himself admits that "whether a car suffering certain types of damage in significant collisions [sic] can be returned to their [sic] pre-collision condition" is an issue that "remains for trial" if this Court finds that the FIC insurance policy provides coverage for diminished value. Supplemental Br. of Respondent Moeller at 5-6. [5]

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[4] Additional confusion is caused by the failure to identify when alleged diminished value damage occurs. Apparently assuming it occurs at the moment repairs are completed, the Court of Appeals failed to analyze the many circumstances in which an insured will suffer no injury by not receiving payment for the car's diminished value in addition to the repaired car, including, for example, when an insured keeps the repaired car until the end of its useful life and then sells it for salvage or when market forces grant the insured a premium upon sale of the repaired car.

[5] The Court of Appeal's assumptions about continuing non-repairable damage are also unworkable and confusing. The Court of Appeals failed to acknowledge that Moeller offered no principled way to distinguish between stigma damage (not covered by the FIC policy) and diminished value damage, when Moeller's evidence indicated that the latter also is caused by "market forces involved in the sale of used vehicles, which are beyond the control of the consumer." CP 917; *see Mansker,* 2010 U.S. Dist. LEXIS 95690, at *16.

II. NAMIC CORRECTLY POINTS OUT THAT THE COURT OF APPEALS' CONTRACT ANALYSIS IS FUNDAMENTALLY FLAWED.

Regardless of the debate over continuing physical damage, the critical question is whether Farmers breached its insurance contract when it refused to pay for the repair of Moeller's car *and* pay Moeller some amount of money for the alleged post-repair diminished value of his car. That issue hinges on the proper interpretation of the FIC policy, and, as NAMIC points out, *see* NAMIC Br. at 9-15, the Court of Appeals made several fundamental errors when it attempted to interpret the policy.

Farmers agrees with NAMIC that the Court of Appeals erred when it considered the policy's definition of loss as "direct and accidental ... damage to" an insured car, CP 19, and concluded that diminished value is a covered loss under this definition. NAMIC Br. at 10-12. Diminished value is not "damage to" a car. Physical damage caused by a collision (e.g., dents and crumpled fenders) is "damage to" a car. Diminished value, if it exists at all, is damage *resulting from* the market perception that a car is more valuable pre-collision than it is post-repair, for whatever reason (e.g., remaining physical damage or fear of unproven damage). *Cf. Moeller,* 155 Wn. App. at 142 (stating that physical damage "results in" diminished value); CP 917 (Moeller's "Wreck Check" analysis, describing

"inherent diminished value" as the "loss in retail market value [attributable] to the market forces involved in the sale of used vehicles, which are beyond the control of the consumer"). Thus, diminished value may be indirect or consequential damage, but it is not direct damage covered by the FIC policy. *See Davis v. Farmers Ins. Co. of Arizona,* 2006-NMCA-99, 140 N.M. 249, 252, 142 P.3d 17 (2006) (agreeing with insurer that loss of market value "cannot be shoe-horned into the coverage for direct damage to [the insured's] truck.").[6]

Another error is demonstrated by the Court of Appeals' conclusion that "diminished value" is covered by the FIC policy because it is a "loss proximately caused by the collision." *Moeller,* 155 Wn. App. at 143; *see* NAMIC Br. at 10-11. The Court of Appeals imported the tort concepts of loss causation and proximate cause into an indemnity policy that has nothing to do with proximate causation. The coverage clause in the FIC policy did not state that Farmers would pay for loss "caused by" or "because of" physical damage to Moeller's car. Rather, it said it would pay "for" damage to the car. A promise to pay damages incurred "because

[6] The Court of Appeals cited *Campbell v. Markel Am. Ins. Co.,* 2000-1448 (La. App. 1 Cir. 9/21/01), 822 So.2d 617, 623 (2001) for the proposition that "diminished value is a covered loss under a 'direct and accidental loss' coverage clause," *Moeller,* 155 Wn. App. 143 n.8, but neglects to mention that the insurer in *Campbell* did not argue this issue. *See Campbell,* 822 So.2d at 621.

of" physical damage may create a trigger that allows an insured to recover all damages flowing from property damage, *see Shin v. Esurance Ins. Co.*, No. C8-5626 RBL, 2009 U.S. Dist. LEXIS 21736, at *16-20 (W.D. Wash. March 13, 2009) (discussing trigger language in underinsured and uninsured motorist ("UIM") coverage), but a promise to pay "for" damage is not a trigger that allows an insured to recover all consequential damages arising out of the accident. Accordingly, the Court of Appeals erred in accepting Moeller's argument that the FIC policy provided coverage for "any and all damages flowing []from" the physical damage to Moeller's vehicle. *Moeller,* 155 Wn. App. at 143 (internal quotation marks and citation omitted).

NAMIC also correctly observes that the "proximate causation" analysis of the Court of Appeals may be applicable when the liability portion of an auto policy is at issue, but it is not applicable when collision coverage is at issue. NAMIC Br. at 11-12. Under liability coverage, an insurer promises to pay "damages" for which an insured is legally liable because of bodily injury to any person and/or property damage arising out of the insured's ownership or use of specified types of vehicles. *See, e.g.,* CP 13-15. Because the insured is facing liability in tort, he can be required to pay damages to make the injured party "whole" and

diminished value may be a component of those damages. But under collision coverage, which is a form of indemnity coverage, an insurer covers only "damage to" an insured vehicle. Despite acknowledging that "'damages' and 'damage' ... have different meanings" under FIC's policy, *Moeller,* 155 Wn. App. at 143 n.7, the Court of Appeals mixed the concepts when assessing the coverage provided under the collision part of the policy. Liability coverage is not co-extensive with collision coverage, but the Court of Appeals construed the FIC policy as if it were. This was a fundamental error.

Finally, as NAMIC recognizes, although an insurance policy should be read as a whole in order to give effect to every provision in it, *see, e.g., Tyrrell v. Farmers Ins. Co. of Washington,* 140 Wn.2d 129, 133, 994 P.2d 883 (2000), the Court of Appeals failed to comply with this rule. NAMIC Br. at 12-15. Even if diminished value could be considered "damage to" an insured vehicle, the Court of Appeals' interpretation of the Limits of Liability and Payment of Loss provisions in the FIC policy effectively renders portions of the policy "inoperative." NAMIC Br. at 14. The Court of Appeals' decision writes the repair option out of the policy because Farmers (and other similarly situated insurers) will never know

when an insured is going to claim breach of contract because some invisible non-repairable damage allegedly will remain after repairs.

III. NAMIC CORRECTLY POINTS OUT THAT THE COURT OF APPEALS' CLASS CERTIFICATION RULING IS INCONSISTENT WITH BETTER-REASONED WASHINGTON LAW.

NAMIC concludes its brief by agreeing with Farmers that class certification was improper in this case. NAMIC Br. at 15-18. NAMIC discusses the case of *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 65 P.3d 1 (2003) in some detail, NAMIC Br. at 16-17, and cites the UIM case of *Degenhart v. AIU Holdings, Inc,* No. C10-5172RBL, 2010 U.S. Dist. LEXIS 125524 (W.D. Wash. Nov. 26, 2010) for the proposition that the kind of showing required under Washington law to establish diminished value makes group generalizations about the fact of injury inappropriate. NAMIC Br. at 17-18.

An additional point worth noting from the *Degenhart* opinion is the court's acknowledgment that at trial, "plaintiffs will be required to demonstrate that their vehicle was physically damaged even after the repair authorized by [the insurer]." 2010 U. S. Dist LEXIS 125524, at *15. The plaintiffs will have to make such a showing because even if they convince a fact-finder that all cars sustaining certain types of collision damage have remaining physical damage after proper repairs are

performed, without proving the difference between the fair cash market value of their car before the collision and the fair cash value of their unrepaired car immediately after the collision, the plaintiffs cannot establish liability for not tendering a "diminished value" payment along with payment for car repairs. Washington law is clear that when personal property is damaged, even under the "make whole" theory of tort law, an individual can recover only "the lesser of" (1) the reasonable value of necessary repairs (plus post-repair diminished value, if it can be proved, *see* Washington Pattern Jury Instruction – Civil 30.10) or (2) the difference between the value of the property immediately before the occurrence and the value of the unrepaired property immediately after the occurrence. *See Thompson v. King Feed & Nutrition Serv., Inc.,* 153 Wn.2d 447, 458-59, 105 P.3d 378 (2005) (explaining that the "lesser than" rule applies when an individual piece of personal property "such as a vehicle" is damaged). A plaintiff cannot prove he is entitled to the first measure of damages without proving that it is less than the second measure. *See Hogland v. Klein,* 49 Wn.2d 216, 220, 298 P.2d 1099 (1956) (acknowledging that "the court should receive evidence both as to the cost of restoring the [damaged property] and as to the amount of its diminished value, and then adopt as the measure of damages the lesser of the two

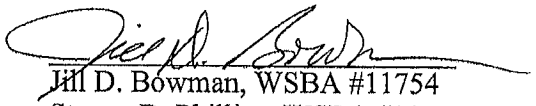
amounts" (internal quotation marks and citation omitted)); *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, 587, 216 P.3d 1110 (2009) (upholding trial court's ruling that damages were unavailable because "lesser of" measure of damages applied and even if plaintiff homeowner's association could prove repair costs for damaged condominium property, it could not prove diminution in value because every condominium owner who had sold his or her unit had made a profit), *review denied,* 168 Wn.2d 1019, 228 P.3d 17 (2010); *accord Gov't Employees Ins. Co. v. Bloodworth,* No. M2003-02986-COA-R100CV, 2007 Tenn. App. LEXIS 404, at *129-30 (Tenn. Ct. App. June 29, 2007) (stating diminished value recovery not allowed in UIM case when cost of repair plus claimed diminished value exceeds the difference between the vehicle's value immediately before the accident and its value immediately after the accident).

In this case, Moeller convinced the trial court to certify his proposed class action based on promises that he and his statistical expert would use a regression analysis (based on sales data for cars other than the insureds') to prove diminished value "exists" and is quantifiable. *See* RP 48-49 (Class Action Certification Hearing, June 27, 2002); *see also* CP 246-1 – 246-6. Based on that analysis, Moeller and his statistical

expert claimed they would be able to prove the difference between the fair cash market value of Moeller's car immediately before the collision and the car's fair cash market value after it was repaired, and they would be able to do the same for all of the insureds' cars. Even accepting Moeller's theory, the proof is incomplete because Moeller offered no evidence proving that the cost of the repairs to his car plus the car's alleged diminished value was less than the difference between the value of his car immediately before the collision and the value of his unrepaired car immediately after the collision. The trial court erred in not realizing this individualized showing would have to be made for every damaged car belonging to a class member, and abused its discretion in certifying a class where the predominance and superiority requirements of CR 23(b)(3) were not met. *See Bloodworth,* 2007 Tenn. App. LEXIS 404, at *134-47; *cf. Defraites v. State Farm Mut. Auto. Ins. Co.,* 03-1081 (La. App. 5 Cir. 01/27/04), 864 So.2d 254 (La. Ct. App. 2004) (reversing certification of a (b)(2) class because diminished value claims "must be assessed on a case by case basis"). The Court of Appeals erred in upholding the trial court's decision.

DATED: February 25, 2011.

STOEL RIVES LLP



Jill D. Bowman, WSBA #11754
Stevan D. Phillips, WSBA #2257

Attorneys for Petitioners Farmers Insurance Company of Washington and Farmers Insurance Exchange

CERTIFICATE OF SERVICE BY MAIL

I certify that on February 25, 2011, I caused copies of the foregoing **PETITIONERS' ANSWER TO AMICUS CURIAE MEMORANDUM OF NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITIONERS' SUPPLEMENTAL BRIEF** to be sent via U.S. Mail, first class, postage prepaid, to the following counsel of record, at the following addresses:

Kenneth W. Masters
Masters Law Group, P.L.L.C.
241 Madison Avenue N
Bainbridge Island, WA 98110-1811

Stephen M. Hansen
Lowenberg, Lopez & Hansen, P.S.
950 Pacific Avenue, Suite 450
Tacoma, WA 98402-4441

James E. Lobsenz
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104

Andrea Holburn Bernarding
Law Office of Andrea Holburn Bernarding
1730 Minor Avenue, Suite 1130
Seattle, WA 98101

Elizabeth A. Cabraser
Morris A. Ratner
Scott P. Nealey
Lieff, Cabraser, Heimann & Bernstein, LLP
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339

Michael R. Nelson
Kymberly Kochis
Jason M. Kurtz
Nelson Levine de Luca & Horst, LLC
120 Broadway, Suite 955
New York, NY 10271

Jill D. Bowman, WSBA No. 11754

70559437.4 0045556-00018